ANG SENG HO

v.

PUBLIC PROSECUTOR

HIGH COURT MALAYA, JOHOR BAHRU
JAMES FOONG JC
[CRIMINAL APPEAL NO. 41-22-89]
2 FEBRUARY 1991

TRADEMARKS: *False trade description - Whether strict liability - Defences - Knowledge - Implied in statute - Statutory notice - Relevant information must be supplied - Reasonable diligence - Duty to enquire as to genuineness - Trade Description Act 1972, ss. 3(1)(b), 24(1)(a), (3).*

On 30 January 1981, enforcement officers from the Ministry of Trade raided the appellant A's shop where packets of groundnuts bearing the brand name 'Thumb Brand Ngan Yin Groundnut Factory' (the said brand) were found to be on display. The groundnuts were proved to be an imitation from the company that produced and sold them under the said brand name. A said that he had purchased the groundnuts from C and it was discovered that C had purchased it from HS in Malacca who in turn had bought it from AL; the company from which AL had purchased the goods was no longer in existence. A contended that as a result, he had no knowledge that the groundnuts were an imitation.

A was convicted of an offence under s. 3(1)(b) of the Trade Descriptions Act 1972 (the Act); hence this appeal.

The learned Magistrate held that the offence was one of strict liability and that A had not satisfied the Court that he could not, with reasonable diligence, have ascertained that the goods did not conform to the description or that the description had been applied to the goods.

A contends that the learned Magistrate had erred in deciding that the offence was one of strict liability.

Held:

[1] (a) As the defences provided for in s. 24(1) and 24(3) of the Act clearly relate to the mental state of the accused person, it must be implied that the said offence under s. 3(1)(b) is one of strict liability;

(b) if Parliament had intended otherwise then, there is no necessity for these defences to be stated, since the prosecution would be required to prove mental knowledge of the accused when the offence was committed;

(c) the words "is for the person charged to prove" under s. 24(1)(a) and 24(3) also imply that the offences under the Act is one of strict liability and it is for the accused person to prove his mental state at the time of the offence in order to avail himself of one of the defences under s. 24(2) of the Act.

(d) as A had not complied with the statutory notice and requirements under s. 24(2), the defences under s. 24(2) of the Act are not available to him.

[2] A also had not satisfied the two conditions in s. 24(3) of the Act as A must enquire from his immediate suppliers whether the groundnuts were genuine at the time of taking delivery.

[Appeal dismissed.]

Cases referred to:
Cottee v. Douglas Seaton (Used Cars) Ltd. [1972] 3 All ER 750
Code v. Barnes [1974] 1 WLR 544
Macnab v. Alexander of Greenock [1972] Crim LR 256

Legislation referred to:
Trade Descriptions Act 1972, ss. 3(1)(b), 24(1), (3)

For the Appellant - Muthu; M/s. Muthu & Co.
For the Respondent - Seah Hock Thean, Deputy Public Prosecutor

JUDGMENT

James Foong JC:

This is an appeal against the decision of the learned Magistrate in Pontian, Johore, where the appellant was found guilty of an offence that reads as follows:

> That you on 30 January 1981 at about 12 noon at shop styled Chop Lam Hong of 47-A, Jalan Balek, in the district of Pontian, in the State of Johore, in the course of your business did offer to supply to wit 230 packets of groundnut to which a false trade description namely 'Thumb Brand Ngan Yin Groundnut Factory' were applied, whereas in actual fact, the said groundnuts were not the 'Thumb Brand Ngan Yin Groundnut Factory' manufactured and packed by Ngan Yin Groundnut Factory Sdn. Bhd., of Lot 19 & 20, Mambang Diawan, Kampar, Perak and that you have thereby committed an offence under s. 3(1)(b) of the Trade Descriptions Act 1972 and punishable under s. 18 of the same Act.

The facts of this case are these. On 30 January 1981 enforcement officers from the Ministry of Trade raided the appellant's shop at No. 47A, Jalan Bakek, Pontian by the name of Chop Lam Hong. Found therein were altogether 250 packets of groundnut some of which were on display. The groundnuts bore the brand name of 'Thumb Brand Ngan Yin Groundnut Factory' which were proved to be imitation from the company that produced and sold them under such brand name.

The appellant contended that he had no knowledge that the groundnuts were imitation since he purchased them from a shop up the road by the name of Chai Hong Seng in Pontian.

Investigations proceeded and it was discovered that Chai Hong Seng in Pontian purchased the said goods from Hock Seng Malaysia Trading Sdn. Bhd., in Malacca.

Further investigations revealed that Hong Seng Malaysia Trading Sdn. Bhd., in Malacca purchased the goods from Aik Lee Heng Trading.

Finally it was discovered that Aik Lee Heng Trading purchased the goods from Hiap An Trading, Johor Bahru which firm was found to be not in existence any longer.

The learned Magistrate in his grounds of judgment found *inter alia* that the offence as charged is one of strict liability and that the appellant had not satisfied the Court that he could not with reasonable diligence have ascertained that the goods did not conform to the description or that the description had been applied to the goods.

In this appeal the learned Counsel for the appellant argued that the learned Magistrate had erred in deciding that the said offence is one of strict liability and had drawn adverse inference against the appellant in determining his guilt in this offence. To support his contention, the learned Counsel tendered the case of *Cottee v. Douglas Seaton (Used Cars) Ltd.* [1972] 3 All ER 750, where it was held by the Queen's Bench Division of the English High Court that the offence similar to that the appellant was charged is one that requires an element of knowledge to be proved by the prosecution.

Section 3(1)(b) of the Malaysian Trade Descriptions Act (the Act) reads as follows:

> Any person who, in the course of a trade or business supplies or offers to supply any goods to which a false trade description is applied is guilty of an offence.

However under subsequent provisions of the Act, defences are made available to an accused person.

Section 24(1) of the Act allows the defence of mistake or the reliance on information supplied to the accused person or the act or default of another person or an accident or some other cause beyond the accused's control.

Section 24(3) of the Act provides further defences to allow the accused person:

> to prove that he did not know and could not with reasonable diligence have ascertained, that the goods did not conform to the description or that the description had been applied to the goods.

The defences so offered relate to knowledge and the mental state or *mens rea* of an accused person. Why are such defences that relate to the mental state of the accused person raised if, as in the normal circumstances, the prosecution would have to prove guilty knowledge in the first place. As these defences are clearly and expressly provided for under the Act it must be implied that the offence under the said Act is that of strict liability. If Parliament had intended otherwise then, there is no necessity for these defences to be stated, since the prosecution would be required to prove mental knowledge of the accused when the offence was committed.

Again under s. 24(1)(a) and s. 24(3) of our Trade Descriptions Act, the word used therein "is for the person charged to prove" the relevant stated defences. This again implies that the offences under the Act are ones of strict liability. It is for the accused person to prove his mental state at the time of the offence in order to avail himself of one of the defences.

This Court adopts the view of Lord Widgery CJ in *Code v. Barnes* [1974] 1 WLR 544 at p. 547 when he asserted that:

> but the fact that Parliament provides such a defence for the people who are innocent in the sense of not being culpable for what is done under s. 1 shows, in my judgment, if any doubt lay, that it is not right to import an element of *mens rea* into it.

The case of *Code v. Barnes* aforesaid was based on a charge under the Trade Descriptions Act 1968 of England and the provisions therein are almost identical in wording to our Trade Descriptions Act except for the numbering of the sections.

This Court does not agree with the decision of *Cottee v. Douglas Seaton (Used Cars Ltd.)*, (*supra*), as the said Court had not addressed its mind to the defences available. Obviously, the same Court in the case of *Code v. Barnes*, which was decided a few years later, had changed its mind to decide that such an offence is one of strict liability. Again such views were adopted in the Scottish case of *Macnab v. Alexander of Greenock* [1972] Crim LR 256.

The appellant attempted to utilise the defences under s. 24(1) of the Act by alleging that it was due to the act or default of another person or, he relied on information supplied by another person.

This Court finds that the learned Magistrate had rightly refused to allow such defences when statutory notice and requirements laid down under s. 24(2) of the Act had not been followed.

The whole intention of the statutory notice and requirements is to enable the relevant authorities to trace and to track down the real offender. In order to do so, relevant information must be supplied by the accused person within the stipulated time. As the appellant failed and/or neglected to comply with the said statutory procedures and had not obtained the leave of Court to do otherwise, defences under s. 24(2) of the Act are not available to him.

The appellant also attempted to utilise the defences provided for under s. 24(3) of the Act. Section 24(3) has no prior statutory requirement before it can be used. However there are 2 conditions which an accused person must prove namely:

(1) he did not know and

(2) he could not with reasonable diligence have ascertained that the goods did not conform to the description or that the description had been applied to the goods.

This Court finds that the learned Magistrate had not erred in deciding that the appellant had not satisfied the aforesaid 2 conditions. This Court wishes to add that it is not sufficient for the appellant merely to state that he did not know that the groundnuts were not genuine when he requested his supplier to supply genuine ones. The appellant must proceed further to enquire from his immediate suppliers whether the groundnuts were genuine at the time of taking delivery. There must be some further steps or enquiries. What steps or enquiries that are considered reasonable must depend on the circumstances of each case. As regards to this case, on the circumstances as shown from the notes of evidence, the appellant had failed to take such steps or made further enquiries whether the goods did conform to the description or that the description had been applied to the goods.

For the reasons as stated aforesaid this Court dismissed this appeal.

Also found at [1991] 2 CLJ 986